



OLD VALUES - NEW HORIZONS

COMMUNITY DEVELOPMENT

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Draft Minutes Zoning Board of Adjustment

January 12, 2016

7:30pm @ Community Development Department

Mike Scholz	Chairman	Present	Mike Mazalewski	Alternate	Present
Heath Partington	Vice Chair	Present	Kevin Hughes	Alternate	Excused
Mike Samsel	Secretary	Present	Jim Tierney	Alternate	Excused
Pam Skinner	Member	Present	Jay Yennaco	Alternate	Excused
Bruce Breton	Member	Present			

Staff:

Dick Gregory, ZBA Code Enforcement Administrator

Suzanne Whiteford, Minute Taker

Meeting called to order at 7:30 by Chairman Scholz

Ms. Scott seated for Mr. Gregory

Case #50-2015 read into the record by Mr. Samsel

Case #50-2015 Appeal of Administrative Decision.

Mr. James Thoele, 125 Lowell Road, is appealing the December 2, 2015 decision of Mr. Dick Gregory, Code Enforcement Officer, to allow 120 Lowell Road (24-F-3000), owned by the Landry Noyles Trust, to operate as a legal existing non-conforming business/use in the Residence A/Rural Zoning Districts.

Motion by Mr. Breton to waive the reading of the abutter list.

Second by Ms. Skinner

Vote 5-0-0

Motion carries

James Thoele, 125 Lowell Road

Mr. Thoele read his application to Appeal Administrative Decision, labelled 'Item 1' contained in Case #50-2015 packet and contained in the file on record.

Betty Dunn asked to delay the case until the Landry's attorney can arrive.

Due to the inclement weather the Landry's attorney is delayed

Motion by Mr. Samsel to continue Case #50-2015 after Case #51-2015 to allow time for the Landry family attorney to arrive due to the inclement weather.

Second Mr. Breton
4-1-0 Mr. Partington opposed
Motion carries

Case #51-2015, abutter list, and letter of authorization read into the record by Mr. Samsel
Lot 3-A-6 51-2015

Applicant – Edward N. Hebert Assoc., Inc.

Owner – John Spinney

Location – 63 Morrison Road

Zone – Rural and Wetland & Watershed Protection District (WWPD)

Variance relief from the following section of the Town of Windham Zoning Ordinance and Land Use Regulations is requested to construct a new deck & porch.

Section 601.3 to allow a 275 sq. Ft. Portion of a deck & porch to be constructed in the WWPD where structures are not allowed.

Section 601.4.8 to allow the installation of the foundation for the deck & porch without a special permit from the Planning Board.

Shane Gendron, Edward N. Hebert Assoc., Inc.

Exhibit A 2 pages, Vision ID: 5170 for 63 Morrison Rd.

Exhibit B (1 and 2) original plans pages 1-4, for Morrison Hill Estates.

Mr. Gendron described photos contained in the packet.

Chairman Scholz asked if the porch was a 4 season porch.

Mr. Gendron does not know if the intended use of the porch is 4 season.

Mr. Gendron reviewed the five variance criteria.

Case opened to the public, no public comment

Motion by Mr. Samsel to go into deliberation

Second by Mr. Breton

Vote 5-0-0

Motion carries

Mr. Samsel commented that the five variance criteria are met and he has no issues with the request.

Mr. Partington reviewed the five variance criteria.

Chairman Scholz agrees the five variance criteria are satisfied.

Motion by Mr. Samsel to grant variances as requested

Second by Mr. Breton

Vote 5-0-0

Motion carries

Case #50-2015 resumed at 8:02pm

Mr. James Thoele, 125 Lowell Road

Reviewed information contained in following documents, contained within Case #50-2015 packet and contained in the file on record:

Item #2
Item #3
Item #4
Item #5
Item #6
Item #7
Item #8
Item #9
Item #10
Item #11
Item #12
Item #13
Item #14
Item #15
Item #16
Item #17
Item #18
Item #19
Item #20

Mr. Thoele gave a video presentation.

Mr. Samsel asked Mr. Thoele if he is here for letter addressed to Jeff Noyles, Landry & Noyles Automotive and Motorcycle Service LLC from Dick Gregory, ZBA/Code Enforcement Administrator dated January 22, 2015. Mr. Thoele indicated he is here to specifically address that letter Mr. Samsel noted.

Mr. Samsel asked Mr. Thoele when he learned about the sign permit and the additional lights.

Mr. Thoele learned of those things when he inspected the file.

Mr. Partington asked if anything is in writing to verify the conversation Mr. Thoele reported to have had with Mr. Dick Gregory in June, 2015.

Mr. Thoele does not have anything in writing to verify the conversation between himself and Mr. Gregory in June, 2015.

Chairman Scholz asked Mr. Thoele what the nature of his discussion was with Mr. Gregory in June, 2015

Mr. Thoele told Chairman Scholz that he (Mr. Thoele) complained about the motorcycle shop turning into an automotive shop.

Chairman Scholz is concerned about the timeliness of the application.

Chairman Scholz is concerned that the time for Mr. Thoele to come forward and speak his opinions was when the items were listed for public hearing.

Mr. Thoele expressed his concern that there are two brand new lifts that have produced more business and traffic. Mr. Thoele explained that at the time of the town's inspection only one lift was in place.

Chairman Scholz believes the ability to appeal that decision or permit was within 30 days of the notice. Chairman Scholz is struggling with the timeliness of Mr. Thoele's appeal because all those things that were permitted are now being appealed. The ZBA has to weigh their jurisdiction over this appeal with regards to timeliness of the request.

Mr. Thoele commented that he is appealing Mr. Gregory's administrative decision to allow it to operate it as a business at all.

Mr. Thoele states that when he was told the business was legal he took that at Mr. Gregory's word. It wasn't until Mr. Thoele came into the town office and physically examined the files for himself that he learned the business was not legal.

Mr. Dick Gregory, ZBA/Code Enforcement Administrator

Mr. Gregory commented that the appeal is untimely based on the rules for an appeal specifies 30 days are given for an appeal. Mr. Gregory reviewed the case according to '*Grandfathering*': *The Law of Non-Conforming Uses & Vested Rights. 2015 Municipal Law Lecture Series Lecture 1*. Mr. Gregory explained that the garage was built in 1946 and started servicing cars. Sometime between 1946 and today it was a gas station. When Mr. Gregory inspected the property there were two automotive lifts in the ground.

Chairman Scholz asked Mr. Gregory about the discussion he had with the applicant in June 2015. Mr. Gregory recalled that most of the conversation between himself and Mr. Thoele was about Mr. Thoele's fence.

Mr. Partington isn't clear if automobile repairs were ongoing or had been abandoned for some time and was an expanded use of motorcycle repair.

Mr. Gregory did not make any determination if the automobile repair had ever stopped. During Mr. Gregory's inspection he noticed there was a vintage (1960's) lift and a new lift sitting in the space.

Mr. Partington asked where the focus on motor vehicles originated. Mr. Partington does not fully understand where the focus on the term 'motor vehicles'. Mr. Partington believes that it seems that Mr. Gregory took the word 'motorcycle' and made it 'motor vehicles.'

Mr. Gregory looked at it as a gas station which repaired automobiles. Mr. Gregory agrees that there was nothing that specifically said motor vehicles were allowed on the site.

Mr. Partington commented that the business was resolved in 1991. There is very little info between 1983 and 2010, essentially no information. Mr. Partington asked how do we know what happened during the time period between 1983 and 2010.

Mr. Gregory determine what happened between 1983 and 2010 based on talking to people and gathering information.

Mr. Breton commented that nowhere is automotive repair listed. Mr. Breton referred to document hanging on the wall in the room. Mr. Breton commented there is a large amount of time where there is no documentation in the file.

Chairman Scholz asked the ZBA for input regarding jurisdiction; specifically does the ZBA have jurisdiction?

Mr. Samsel commented there are 21 letters in support of the garage in the file. Mr. Samsel read RSA 677:2 read into the record. Mr. Samsel commented that 1/22/2015 was the date of record that was the intent to appeal the decision.

Chairman Scholz agrees with Mr. Samsel.

Ms. Scott commented that RSA 676:5 11A is the correct RSA, Mr. Samsel read the wrong RSA. Mr. Samsel acknowledged he read the incorrect RSA.

Mr. Partington is in agreement with Chairman Scholz and Mr. Samsel. Mr. Partington commented there is a 30 day appeal period in the RSA and ZBA bylaws. The sign permit clearly states the intention for automotive repair. The time to appeal was during the 30 day appeal period when the permits were noticed; 4/30/15, 5/14/15, and 2/5/15 were the dates of the permits. The administrative decision could have been appealed within the 30 day appeal period after one of the permit dates listed. Mr. Partington, based on the RSA, ZBA bylaws, and dates of the permits, the ZBA is not within jurisdiction.

Chairman Scholz continues to address the issue of jurisdiction due to the elapsed time period.

Chairman Scholz commented that all the permits are publicly posted in two places.

Ms. Scott commented that permit hearings are posted in the department and the newspaper.

Mr. Partington and Mr. Samsel agree that they are open to public comment regarding the timeliness, only, of the appeal.

Scott Burbick, 129 Lowell Road

- Abutter
- Abutter's property value dropped by \$46k. The only change has been the business.
- If the permit was issued and sign placed 30 days later we would not have had an opportunity to appeal.
- Asked for clarification regarding abutter notification when there is a significant change to the property.
- The permits were granted improperly based on the continuance of a business.

Laura Scott, Director Community Development

All permits issued are posted weekly in the department and the newspaper. No abutter notifications are sent out for building permits. There is no way for the town to know when signs are placed after a permit is issued.

Mr. Partington commented that the process isn't necessarily fair. Residents would have to be looking for it to know it was coming.

Chairman Scholz commented that the community can decide or petition a change to the ordinance. We have statutory requirements. The original permit was issued on 4/30/15

Tom Case

- The ZBA is basing their decision on when the permit was issued.
- The applicant is appealing a decision of the code enforcement administrative.
- The June conversation was not put in writing.
- The appeal has to be based on a letter.

Mr. Partington commented that 1/22/15 a letter was issued to the homeowner.

- Mr. Case commented that an appeal has to be based on the Code Enforcement Administrator's decision in writing.

Mr. Partington asked Mr. Case what is the time limit for appealing the Code Enforcement Administrator's decision?

- Mr. Case commented that the timeline starts when an issue is brought to the attention of the Code Enforcement Officer. An applicant could wait a year to act on an issued permit. If Mr. Thoele sent Mr. Gregory a letter, Mr. Gregory sent a letter back that is when the 30 day appeal period starts.

Mr. Samsel asked specifically what letter Mr. Thoele was referring to and Mr. Thoele answered 1/22/15.

Mr. Breton commented that the item #13 on Mr. Gregory's response, the second line from the bottom, he makes a determination that everything was in line. Mr. Breton referred to Exhibit 4 letter. On 12/2/2015 Mr. Gregory sent a letter that the office made the determination that everything is allowed.

Mr. Partington states Mr. Gregory made the decision on 1/22/2015 and he sent the letter on 12/2/2015.

Mr. Breton, assume looking at all the evidence, Mr. Thoele read everything, the last correspondence was 12/2/2015 and Mr. Thoele made a decision to appeal. Mr. Thoele is not appealing the permits, he is appealing the whole item.

Jennifer Zink, 39 No. Lowell Road.

- 50 year resident
- The applicant had ample time since January to place an appeal
- The 30 days should stand.
- The Landry's have been there forever.

Jason Breley,

- Attorney representing Jeff and Susie Knowles
- Permits issued for the business 2/2015, 5/2015, 4/2015.
- Letter 1/22/2015 determining a pre-existing use.
- Reviewed Rules of Procedure 904 and asked why we are here?

Chairman Scholz commented there is no reasonable expectation that an abutter will know something is going to happen without notification. There is no time line associated with the decision. The January decision referenced is not significant for developing a time line.

Mr. Breton commented that on 11/27/15 Mr. Thoele writes the town and it answered two weeks later. Mr. Thoele is not questioning the permits. Mr. Thoele is questioning the nonconformity of the business.

Mr. Samsel commented that the discussion about the permits are items that could have been appealed. The correspondence from Mr. Gregory dated January 22, 2015 is a determination letter in response to the letter from Mr. Dingum. The determination letter only went to the Landry's, it was not publicly sent out.

Jim Tierney

The advertisement for this evenings appeal was for an appeal of administrative decision. The Letter itself, on face value, is appealable. Whenever a code official is asked to make a decision on something it is appealable and gets it due process. There is no definition for automobile or motor vehicle in the RSA. The choices are to leave the town's decision as it stands, or modify it. The ZBA can't change the past, change the permits, or add to the zoning ordinance. The ZBA can only consider the request which is: How did Mr. Gregory come to his decision and was the decision correct?

Betty Dunn

- Letter dated 12/2/2015 says see attached determination letter which was dated 1/22/2015.
- It is placed in the file and people can come and look at it at any time.
- Could someone else or should someone else have known?
- The abutters should have known the appeal period has expired and the ZBA does not have jurisdiction based on the 30 day appeal period.

Mr. Thoele commented that the ZBA did not vote on this decision and read Rules of procedure chapter 8 paragraph 5

Mr. Thoele commented that had he been notified by paper he would have attended the hearing; referring to the January 22, 2015 letter.

**Motion by Mr. Samsel to go into deliberation regarding timeliness of the application ONLY
Second Partington**

Vote 5-0-0

Motion carries

Mr. Samsel believes this is a tougher decision the ZBA has to make from time to time. Before testimony can be considered, the ZBA has to determine if this is an appealable letter. There was a request from an abutter. Mr. Gregory's determination letter is when the clock starts. Based on those facts, Mr. Samsel does not believe the ZBA has jurisdiction.

Mr. Partington commented that the rules are what they are. 1/22/15 is not reasonable, no one could have seen that. Mr. Partington will base his decision on the date of the permits and the verbal conversation between Mr. Thoele and Mr. Gregory.

Mr. Breton commented that last January it was determined that an automotive business could be there. N 11/27/2015, two letters are sent to the town that the business is growing and getting bigger and bigger. Mr. Thoele goes through the files and appeals the expansion of a nonconforming business. Mr. Breton does not believe Mr. Gregory's decision is correct. Mr. Thoele is appealing the business being conduct on the property and it is being appealed within the past 30 days.

Mr. Partington commented that there is no evidence that nothing has changed since January 22, 2015.

Mr. Breton believes Mr. Thoele is within his rights to appeal, there have been 3 letters within the last 30 days.

Chairman Scholz commented there were signed permits issued and anyone could have gone and looked at the file. It is clear, based on the permits, a reasonable person would have found Mr. Gregory's letter of decision and could have appealed at that time. Chairman Scholz does not believe the ZBA has jurisdiction.

Ms. Skinner agrees with Chairman Scholz

Breton table this and continue after town attorney has had time to review the documents

Chairman Scholz agrees with Breton. Chairman Scholz wants to make the right decision.

Mr. Samsel feels that we have enough information regarding the time line to make a decision.

Ms. Skinner commented the business has been there as long as she has lived in town.

A Motion was made by Mr. Partington to deny Case #50-2015 for the Appeal of Administrative Decision of Mr. Dick Gregory, Code Enforcement Officer, to allow 120 Lowell Road (24-F-3000), owned by the Landry Noyles Trust, to operate as a legal existing non-conforming business/use in the Residence A/Rural Zoning Districts as it is untimely and out of the ZBA jurisdiction. The 30 day appeal period has run out based on the original decision letter was issued 1/22/15, and related permits issued on 2/5/2015, 4/30/2015 and 5/14/2015/5. Second by Mr. Samsel

Mr. Breton disagrees with Mr. Samsel. Mr. Thoele is appealing the nonconformity of the expanded use. Mr. Thoele's sent a letter to Mr. Gregory in November. Mr. Gregory responded to the letter in December. Mr. Thoele is not appealing the permits, he is appealing that the use has expanded. Item #12 states what is going on and the business is not in conformance; that is what Mr. Thoele is saying in the letter. Mr. Thoele is saying the business has expanded more than it is allowed to.

Mr. Partington agrees the last letter is within 30 days. There is no change in Mr. Gregory's decision made 1/22/2015.

Mr. Breton stressed that Mr. Thoele does not have an issue with the permits, he is saying the current business has been expanded and that is what he is appealing. What was allowed there has expanded

and he is appealing the expansion. Where do the homeowners have remedy if a nonconforming business grows and grows in front of them?

Mazalewski commented there other forms of remedy, this is not a dead end.

Chairman agrees with Mr. Breton.

Vote 4-1-0 Mr. Breton opposed.
Motion carries

10:03pm brief recess

Meeting resumed at 10:19pm

Case #41-2015 and letter of authorization read into the record by Mr. Samsel

Case #42-2015 Application of Brian and Pamela McCarthy Request for Rehearing on the decision made by, Lot No. 22-L-202, located at 11 Prescott Road, Windham, NH

Mr. Gregory clarified that Mr. David M. Groff is the person requesting the rehearing.

Application for Rehearing Facts reviewed by the ZBA:

1. no technical error, no new information
2. no tech error, no new information
3. no technical error, no new information
4. no facts supporting the statement, no technical error, no new information
5. no technical error, no new information
6. no technical error, no new information
7. no technical error, no new information
8. no technical error, no new information
9. no technical error, no new information
10. no technical error, no new information
11. no technical error, no new information Mr. Partington commented there may be an attempt to introduce new information in this packet which cannot be accepted
12. no technical error, no new information
13. no technical error, no new information
14. no technical error, no new information
15. no technical error, no new information
16. no technical error, no new information

Based on the information provided to the ZBA from Mr. Graff a motion was made by Mr. Breton to deny Case #41-2015. The ZBA determined there were made no technical error or no new information that was not available at the original hearing.

Second by Mr. Samsel

Vote 5-0-0

Motion carries

Motion by Mr. Samsel to adjourn

Second by Partington

Vote 5-0-0

Meeting adjourned at 10:43pm

Minutes submitted by Suzanne Whiteford, minute taker.